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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE POOLE,

Defendant and Appellant.

A152439

(Alameda County
Super. Ct. No. 177413B)

On January 1, 2015, Andre Poole shot and killed Derrick Williams, Jr. during a midday wild-west-type shootout at a Valero gas station in Oakland. Poole shot Williams multiple times at close range during a drug deal gone awry. Poole was subsequently convicted of first degree murder with a special circumstance, and an alleged firearm enhancement was found to be true. He was also convicted of attempted voluntary manslaughter and possession of a firearm by a felon.

Poole appeals his convictions and sentences based on four theories. First, Poole asserts that the trial court erred by reading jury instruction CALCRIM No. 361. Second, Poole claims the prosecutor committed misconduct in his closing argument by attacking defense counsel's integrity, by inviting the jury to apply propensity reasoning based on Poole's criminal disposition, and by injecting personal opinion into the closing argument. Third, Poole claims that, although his first two grounds for appeal may not be sufficient in-and-of-themselves to warrant reversal or remand for a new trial, cumulatively those

errors were prejudicial such that they deprived Poole of due process and a fair trial. Last, assuming this court affirms the convictions, Poole appeals the sentencing in this case and requests that this court remand for resentencing in accordance with amended section 12022.53. We affirm the convictions and remand for resentencing.

I. BACKGROUND

The following facts were memorialized by various surveillance cameras at the Valero gas station where the incidents occurred. The videos were shown to the jury and admitted into evidence at trial. These facts were further substantiated by witness testimony.

On January 1, 2015, at approximately 1:30 p.m. Andre Poole and three associates pulled into a Valero gas station in Oakland to get gas. Derrick Williams was at the gas station with his girlfriend and one of his friends selling Xanax. While passing each other's respective clans, Poole became aware that Williams was selling Xanax. Poole expressed interest in purchasing, and Williams agreed to sell Poole 20 Xanax pills. Poole returned to his vehicle to await delivery of the drugs while Williams went back to his own vehicle to count out the 20 pills.

After counting out the pills, Williams walked across the gas station breezeway to Poole's minivan to deliver the drugs. Williams had the pills in his left hand and nothing in his right hand as he walked over to Poole. As Williams approached, Poole turned his back to Williams and reached inside his sweatshirt as though he was taking out money to purchase the pills. When Poole turned back around to face Williams, Poole had a gun in his right hand and took the pills from Williams with his left hand. Poole put the pills into his sweatshirt pocket, then reached around the back of William's neck with his left hand while still holding the gun in his right hand. Next, Poole brought his left hand down to William's chest and yanked some chains from around Williams's neck.

Poole then lifted his gun up to Williams' neck and fired multiple times at close range. Williams fell to the ground as Poole continued to fire shots at him. At some point during the encounter Williams retrieved a gun from somewhere on his person and was holding it in his right hand when he was shot. Williams never raised his gun or pointed it

at Poole. When Williams fell to the ground his gun fell to the ground near his feet. Williams succumbed to his injuries at the scene.

Once Poole began firing at Williams, Poole's associate, Marcus Mayfield, and Williams's associate, Stanford Boatner, began firing at each other across the gas station. As the gunfire continued, Poole and his friends retreated into a nearby neighborhood. Poole was arrested in Sacramento a week after the incident.

In an amended information filed on February 7, 2017, Poole was charged with four counts. Count one charged Poole with: (1) the murder of Williams in violation of Penal Code¹ section 187; (2) a special circumstance robbery murder was alleged in violation of section 190.2 subdivision (a)(17)(A); and, (3) a firearms enhancement was alleged pursuant to sections 12027.7, subdivision (a), 12022.5, subdivision (a), and 12022.53, subdivisions (b)–(d) and (g). Count two alleged Poole attempted to murder Stanford Boatner in violation of sections 187, subdivision (a) and 664, and also alleged a firearm enhancement pursuant to section 12022, subdivision (a)(1). Count four alleged possession of a firearm by a felon in violation of section 29800, subdivision (a)(1).

Poole was convicted of first degree murder in count one and sentenced to 25 years to life. Poole was sentenced to an additional consecutive 25 years to life in count one based on the jury finding the firearm enhancement to be true under section 12022.53. Finally, as to count one, the jury having found the special circumstance under section 190.2, subdivision (a)(17)(A) to be true, Poole was sentenced to life without the possibility of parole—sentence consecutive to the determinate sentence below. On count two, Poole was found guilty of the lesser included offense of attempted voluntary manslaughter under sections 192 and 664 and given a determinate sentence of five years and six months. Poole was sentenced to an additional consecutive determinate term of one year on count two for an enhancement under section 12022, subdivision (a)(1). Poole was found guilty of possession of a firearm by a felon as charged in count four, and

¹ All statutory references herein are to the Penal Code unless otherwise noted.

sentenced to an additional consecutive eight months, making his total determinate term seven years and two months.

II. DISCUSSION

A. The Court Did Not Err by Reading Jury Instruction CALCRIM No. 361

Poole claims it was improper for the trial judge to read CALCRIM No. 361 (failure to explain or deny adverse testimony) to the jury, and the effect of that erroneous jury instruction was so prejudicial to the defendant's claim of self-defense that we should reverse the decision below. Applying de novo review as required, we conclude that the trial court did not err by reading CALCRIM No. 361. (*People v. Waidla* (2000) 22 Cal.4th 690, 733 (*Waidla*); Cal. Const., Art. VI, § 13.)²

CALCRIM No. 361 is appropriate “when a defendant completely fails to explain or deny incriminating evidence, or *claims to lack knowledge and it appears from the evidence that the defendant could reasonably be expected to have that knowledge.*” (*People v. Cortez* (2016) 63 Cal.4th 101,117, italics added (*Cortez*).) The *Cortez* court found the CALCRIM No. 361 had been properly given “notwithstanding defendant's professed lack of knowledge about certain matters” because “there was ample evidence” in the record, including testimony by other witnesses, “that defendant ‘could reasonably be expected to know’ these facts or circumstances.” (*Id.* at pp. 121–122.)

Here, when Poole was questioned as to whether he had his gun out at the time Williams approached him by the van to deliver the Xanax pills, Poole responded that he “can’t give a yes-or-no question [*sic*] to that because I don’t—like, it happened so fast to where I really don’t remember.” As in *Cortez*, the record here, including video evidence and other witness testimony, leads us to conclude that Poole's assertion of memory lapse was a claimed lack of knowledge which it appears from the evidence that he could

² “No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, *after an examination of the entire cause, including the evidence*, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Const., Art. VI, § 13, italics added.)

reasonably have been expected to have We therefore hold that the trial court did not err by instructing the jury according to CALCRIM No. 361.

B. Claims of Prosecutorial Misconduct and Ineffectiveness of Defense Counsel

Next we lay to rest Poole's claim of misconduct during the prosecutor's closing argument and his claim of ineffective assistance of counsel. Turning to the first strand of this line of argument, the applicable federal and state standards governing prosecutorial misconduct are well established. A prosecutor's behavior violates the federal Constitution when it comprises a pattern of conduct " " " 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " " " " (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " " " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " " " " (*Ibid.*) Additionally, when the claim focuses upon comments that the prosecutor made before the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072 (*Berryman*), overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 (*Hill*).)

Poole claims that the prosecutor acted improperly during closing argument on four fronts. First, he argues the prosecutor improperly invited the jury to employ propensity reasoning in their decision-making process by repeatedly referring to Poole as being in the " 'business' of robbery." No objection was raised by defense at trial to the prosecution's references to Poole's "business" of robbery. Poole admitted on the record to having been involved in, charged with, and convicted of a second degree robbery in 2008, seven years before the instant offense, and appellate counsel claims this does not amount to being in the "business" of robbery. The defense attorney chose to strategically address the "business of robbery" comments head on in his closing argument by saying that " 'business as usual' implies that Mr. Poole is running around town shooting people. That he's a callous killer. That he does it again and again when there is not one iota of

proof. That was because it's not true." This was a tactically sound response to the prosecutor's theme.

Second, Poole argues the prosecutor attacked the defense counsel's integrity by pointing out that "defense counsel didn't 'try to explain' the actions at the gas station but instead used 'the same canned phrase' as [Poole] 'said on the stand.'" Poole claims it was misconduct for the prosecutor say this was a " ' rare' case in which defense counsel was 'making [his] points for [him],'" and then going on to tell the jurors " ' [t]he defense wants to make you believe that [Poole] had a gun out in his right hand' and did 'nothing.'" Additionally, Poole focuses on the prosecutor's remark that "defense counsel was a 'seasoned attorney' who 'knows the words that he uses very well.'" Poole claims the statements about the defense attorney's level of expertise and knowledge of the art of persuasion equate to improper accusations by the prosecutor that "defense counsel was intentionally being deceitful and underhanded." We are unpersuaded that these prosecutorial remarks to the jury amounted to anything more than fair comment on the evidence. A prosecutor "is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 396.) And fair comment includes comment on any failure by the defense to put on evidence explaining incriminating discrepancies in the evidence. (*People v. Brady* (2010) 50 Cal.4th 547, 565–566.) Here, pivoting from defense counsel's suggestion that Poole could not have intended robbery because he knew the victim had a gun in his hand, the prosecutor simply turned this logic around. Accepting what the video evidence plainly showed—that Poole was robbing the victim by grabbing his chains—he argued that, based on defense counsel's own reasoning, the victim must not have been holding a gun at the time.

Granted, as Poole points out, personal attacks on the integrity of defense counsel are improper. (*Hill, supra*, 17 Cal.4th at p. 832; see e.g. *Sassounian v. Roe* (9th Cir. 2000) 230 F.3d 1097, 1106 [improper to imply defense counsel had fabricated evidence]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075 [improper and prejudicial for the

prosecutor to state that the defense attorney did not want the jury to hear the truth and had to help his clients plan a defense)]; *People v. Jones* (1997) 15 Cal.4th 119, 168 [improper for the prosecutor to state that defense counsel was lying and that his lack of candor damaged his credibility], overruled on another ground in *Hill, supra*, 17 Cal.4th at p. 823, fn. 1.) But we see no such attack on the record presented here. At most, as the court pointed out in *People v. Gionis* (1995) 9 Cal.4th 1196, rejecting a claim of prosecutorial misconduct for statements far more prejudicial and egregious than those offered to the jury in this case, “[t]aken in context, the prosecutor’s remarks simply pointed out that” the defense attorney in this case was “schooled in the art of persuasion; they did not improperly imply that defense counsel was lying.” (*Id.* at pp. 1216–1217.)

Next, Poole argues that the prosecutor improperly injected his own personal opinion into the closing argument by stating to the jury that the word “ ‘reasonable,’ ” with regard to reasonable doubt, was “ ‘based on common sense.’ ” Defense counsel raised an objection to this statement at trial on the grounds that it called for an “improper legal conclusion.” Poole offers no reason that this objection was not properly overruled by the trial judge. Poole further argues that the prosecutor injected his own personal opinion by stating to the jury that they had “more common sense than [him], [had] more life experience than [him],” and, having heard all the evidence in the case, he was “confident” that he jury would “come to the only reasonable conclusion in this case and find the defendant guilty. . . .” No objection was raised at trial to these statements. Furthermore, no objection was ever raised to any statements complained of here on the grounds that the prosecutor was injecting personal opinion into his argument. This court generally will not address a claim of prosecutorial misconduct on appeal unless the defense made “a timely objection at trial and request[ed] an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.” (*People v. Price* (1991) 1 Cal.4th 324, 447.) “A defendant’s failure to object to curable misconduct . . . waives the issue for appeal.” (*People v. Wharton* (1991) 53 Cal.3d 522, 591.) Any harm caused by the prosecutor’s statements in this case would have been cured upon objection by a simple admonition at the judge’s discretion.

Finally, Poole contends defense counsel's performance was constitutionally deficient because of his failure to raise objections to the statements by the prosecutor that we discuss above. Poole claims that, due to that ineffective assistance of counsel, the prosecutorial misconduct issues raised by these statements are properly before this court on appeal despite—indeed because of—his counsel's failure to preserve them. We cannot agree. To establish ineffective assistance of counsel under the Sixth Amendment or under article I, section 15 of the California constitution, Poole “must demonstrate both deficient performance under an objective standard of professional reasonableness and prejudice under a similarly objective standard of reasonable probability of an adverse effect on the outcome.” (*Waidla, supra*, 22 Cal.4th at p. 718; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687–688 (*Strickland*) [To prove ineffective assistance of counsel “defendant must show that counsel’s representation fell below an objective standard of reasonableness” under the “prevailing professional norms.” The defendant must also show that counsel’s “deficient performance prejudiced the defense” through “errors . . . so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”].)

Poole's ineffective assistance arguments fail for lack of any showing of prejudice. The statements in question were “hardly determinative of the balance between inculcation and exculpation or aggravation and mitigation.” (*Waidla, supra*, 22 Cal.4th at p. 719.) “As the high court has observed, ‘[i]solated passages of a prosecutor’s argument,’ ‘like all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear.’ ” (*Cortez, supra*, 63 Cal.4th at p. 133, quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646–647.) Ultimately, we are concerned with whether a defendant received a fair trial. The question we must decide in determining whether Poole suffered a denial of due process in this case is, but for the prosecutorial conduct complained of, “is it reasonably probable that a result more favorable to the defendant would have occurred.” (*People v. Strickland* (1974) 11 Cal.3d 946, 955.) We do not agree that the prosecutor’s conduct here was egregious or that it infected the trial

with unfairness that amounts to a denial of due process. The evidence against the defendant was so compelling—particularly the video footage—that even if the prosecutor had not made any of the statements complained of, it is not reasonably probable a result more favorable to the defendant would have occurred. (See *Berryman*, *supra*, 6 Cal.4th 1048, 1072 [“We simply cannot conclude that the prosecutor used a method to persuade the jury that was ‘deceptive’ or ‘reprehensible.’ ”].)

Poole’s ineffective assistance claim also fails to meet the performance prong of *Strickland*. To succeed on a claim that defense counsel’s performance fell below a constitutional level of professional reasonableness, the burden is on the defendant to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” (*Strickland*, *supra*, 466 U.S. at p. 687.) The record here does not come close to meeting that demanding standard. The specific question is whether counsel’s failures to object to what he now wishes to assert as prosecutorial misconduct for the first time on appeal fell below an objective standard of reasonableness. With failures to object during argument—where there can be any number of tactical reasons counsel may have for withholding particular objections in the courtroom—the burden of showing constitutionally deficient performance is not easily met. Poole has made no such showing on this record. Absent convincing evidence to the contrary, this court “strongly presume[s]” that counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” (*Id.* at p. 690.)

C. No Cumulative Error Occurred That Would Justify Reversal in This Case

Poole claims the error made by the trial court by administering CALCRIM No. 361 along with misconduct by the prosecutor during his closing argument cumulatively prejudiced Poole such that reversal is required. We disagree. In determining whether a cumulative error has occurred requiring remand, this court follows our sister court’s decision in *People v. Williams* (2009) 170 Cal.App.4th 587, 646. “Under the cumulative error doctrine, the reviewing court must ‘review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury

would have reached a result more favorable to defendant in their absence.’ [Citation.] When the cumulative effect of errors deprives the defendant of a fair trial and due process, reversal is required.” (*Ibid.*) Here we have found no errors, but, as in *Williams*, any errors “we may have assumed for purposes of argument . . . were harmless under any standard, whether considered individually or collectively.” (*Ibid.*) The video evidence alone in this case provided the jury with overwhelming evidence against the defendant on which it could have based its conclusion entirely and likely would have reached the same verdict.

D. Remand for Resentencing Under Amended Section 12022.53 is Appropriate

Poole was found guilty of murder in the first degree and sentenced to 25 years to life. Pursuant to section 12022.53, subdivision (d), the trial court imposed a sentence enhancement that added a consecutive term of 25 years to life based on Poole’s intentional discharge of a firearm which caused Williams’s death during the commission of a listed felony.

Section 12022.53 was amended by Senate Bill No. 620 in 2017. Those amendments became effective January 1, 2018. (Sen. Bill No. 620 (2017-2018 Reg. Sess.); Stats. 2017, ch. 682.) The prior version of 12022.53 did not afford the trial court any discretion in deciding whether to impose additional sentencing for enhancements. (See § 12022.53, former subd. (h), added by Stats. 2010, ch. 711, § 5 [“Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.”].) Under the amended version of section 12022.53, it is entirely within the trial court’s discretion to strike or dismiss enhancements at the time of sentencing “in the interest of justice pursuant to Section 1385.” (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682.)

Amended section 12022.53, subdivision (h), applies retroactively “to all nonfinal judgments.” (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712.) Because Poole’s conviction is not yet final, the amended version of section 12022.53, subdivision (h) is applicable to the enhancement and sentence imposed on him under section 12022.53, subdivision (d).

“ ‘[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to “sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court,” and a court that is unaware of its discretionary authority cannot exercise its informed discretion.’ ” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 quoting *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

In *People v. Johnson* (2019) 32 Cal.App.5th 26, there was substantial evidence on the record that the trial court was unsympathetic to the defendants and likely would not have imposed a lesser sentence under the amended version of section 12022.53. (*Johnson*, at p. 69.) There, the trial court had pointed out on the record that the firearm enhancement with regard to one of the defendants “ ‘appear[ed] to [the court] to be entirely appropriate,’ ” and, with regard to a second defendant, the court stated that “ it ‘ha[d] no discretion to strike’ the serious prior and ‘wouldn’t strike if [it] did have discretion.’ ” (*Ibid.*) Nonetheless, “out of an abundance of caution,” the Court of Appeal remanded the case for resentencing under the newly attained and greatly modified sentencing authority of the trial judge. (*Ibid.*)

Compared to the record that was found to be an insufficient basis for the denial of remand in *Johnson*, the record here is devoid of any indication from which to infer that the trial judge would not have stricken Poole’s gun enhancement. As in *Johnson*, we conclude it is best to err on the side of caution and remand the case for resentencing at the discretion of the trial judge under the amended version of section 12022.53.

III. DISPOSITION

We conditionally vacate the sentence and remand for resentencing so that, applying amended section 12022.53 retroactively, the court may exercise its newly conferred discretion, or choose not to exercise it, as appropriate. The judgment is otherwise affirmed.

STREETER, ACTING P.J.

WE CONCUR:

TUCHER, J.

BROWN, J.

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